THE COMPTROLLER OF INCOME TAX v. A.B.

[C. A. (Rose C.J., Chua and Ambrose JJ.) January 20, 1960]

[Singapore — Civil Appeal No. — of 1959]

Income Tax — Income accruing — Meaning of — Income Tax Ordinance (Cap. 166), s.10 — Declaration of dividend by limited company — Dividend not paid but credited to shareholders' account to pay for shares which directors are contemplating issuing in the near future — Whether such dividend was assessable income of shareholder.

The shareholders of the X.Y.Z. Co. Ltd. had at a general meeting held on the 23rd December, 1954, passed the following resolution under the authority of its articles of association: "That a dividend of 250% less income tax at 30% be and is hereby declared for credit to the accounts of shareholders whose names duly appear in the company's share register on the 31st December. 1954, to pay off any amount any of them may owe to the company and also to pay for the value of the shares which the directors are contemplating issuing to them in the near future."

The respondent was indebted to the company in the sum of $380 on the 23rd December, 1954. On the 31st December, 1954, his account was credited with a dividend of $20,000 less $6,000 being income tax at 30% and the sum of $1,000 being director's fees for 1952 and 1953. His credit balance at the end of 1954 was $14,620.

On the 30th June, 1955, the directors resolved that shares of $100 each be allotted as set out in the resolution to certain named persons for payment in cash and the respondent was accordingly allotted 140 shares of $100 each. The company debited his account with $14,000 being the value of the new shares allotted to him.

Held: (1) in order to determine whether the dividend of $20,000 was income or capital, the whole of the transaction must be looked at, that is. the resolution passed on the 23rd December, 1954, the crediting of the respondent's account with the sum of $14.000 on the 31st December. 1954, the resolution of the directors and the debiting of the respondent's account on the 31st December, 1955, with the sum of $14,000, being the value of 140 shares of $100 each allotted on the 30th June, 1955;

(2) the resolution approving the dividend expressed the determination of the company that the money was not to be paid to the shareholders nor placed at their disposal but to be applied as stated in the resolution. Under the circumstances. the shareholders had no option to receive cash in lieu of shares;

(3) the resolution did not give the respondent a right to sue for the dividend in cash, his only right being to have the dividend credited to his account and applied as stated in the resolution approving the dividend;

(4) a dividend is not to be treated as income accruing in the Colony merely because it has accrued as a dividend. The money must accrue as income and the dividend in question did not accrue by way of income in view of the terms under which it was credited to respondent's account;

(5) the dividend of $20,000 declared by the company on the 23rd December. 1954. was not part of the assessable income of the respondent within the meaning of section 10 of the Income Tax Ordinance.

Cases referred to:—

(1) *Commissioners of Inland Revenue* v. *John Blott*, [1921] 2 A.C. 171; 8 T.C. 101.

(2) *St. Lucia Usines & Estates Co. Ltd.* v. *Colonial Treasurer of St. Lucia*, [1924] A.C. 508.

COURT OF APPEAL.

J. B. Jeyaretnam (Crown Counsel) for the appellant.

J. E. Lloyd for the respondent.

Cur. Adv. Vult.

Ambrose J. (with whom **Rose C.J.** and **Chua J.** agreed): The question to be decided in this appeal is this: was a dividend of 250 per cent less income tax at 30 per cent which was declared on the 23rd December, 1954, by the X.Y.Z. Co., Ltd. for credit to the account of the respondent part of the assessable income of the respondent for the year 1955 ? If it was part of his assessable income, the respondent would be entitled to be credited by the Comptroller of Income Tax with the sum of $6,000 which was deducted from it by the company and paid as income tax.

The question arises upon these facts. The respondent is a director of the company, which is a private limited company incorporated in Singapore. In December, 1954, he held 80 shares of $100 each in the company.

Article 93 of the articles of association of the company provides that the directors may with the sanction of a general meeting of the members of the company from time to time declare a dividend out of the net profits of the company.

Article 94 provides that the directors may deduct from any dividend payable to any member unpaid calls and debts due by him to the company.

Article 96a provides for the capitalisation of reserves in this manner. The company in general meeting may upon the recommendation of the directors resolve that it is desirable to capitalise any part of the amount standing to the credit of the company's reserve accounts and profit and loss account. The company may accordingly resolve that such sum be set aside free for distribution, subject to one condition, amongst the members entitled thereto if distributed by way of dividend and in the same proportions. The condition is that the sum is not to be paid in cash but to be applied in paying up amounts unpaid on any shares or in paying up in full unissued shares to be allotted and distributed as fully paid up.

Article 96b provides that the directors shall make all appropriations and applications of the undivided profits resolved to be capitalised and all allotments and issues of fully paid shares, and generally shall do all acts and things required to give effect to the resolution.

At an ordinary general meeting held on the 23rd December, 1954, the shareholders in the company passed the following resolution:

"That a dividend of 250 per cent less income tax at 30 per cent be and is hereby declared for credit to the accounts of shareholders whose names duly appear in the Company's share register on the 31st December 1954 to pay off any amount any of them may owe to the Company and also to pay for the value of the shares which the Directors are contemplating issuing to them in the near future."

On the 23rd December, 1954, the respondent was indebted to the company in the sum of $380.

On the 31st December, 1954, a dividend notice was sent to the respondent. This stated that a dividend at the rate of 250 per cent on 80 shares of $100 each held by him had been declared on

account of the year 1953. It further stated that his account had been duly credited as follows:

Dividend	$20,000
Less income tax at 30 per cent	6,000
Net amount	$14,000

On the same date the respondent's account was credited as follows:—

"250 per cent less 30 per cent income tax declared on 23.12.1954	$14,000
Director's fees for 1952 and 1953 ...	1,000."

His credit balance at the end of 1954 was thus $14,620.

On the 30th June, 1955, it was resolved by the directors of the company that 3,636 ordinary shares of $100 each be allotted as set out in the resolution to certain named persons for payment in cash. According to the resolution 140 shares of $100 each were allotted to the respondent. The secretaries were authorised by the resolution to enter the names of the allottees in the share register and to issue share certificates to the allottees under the common seal.

On the 31st December, 1955, the respondent's account was debited as follows:

"Value of 140 shares of $100 allotted on 30.6.55	$14,000."

The Comptroller of Income Tax decided that the dividend of $20,000 declared by the company on the 23rd December, 1954, was not part of the assessable income of the respondent for 1955. The respondent was so informed by the Comptroller by a letter dated the 16th November, 1955. The respondent appealed to the Income Tax Board of Review, who dismissed his appeal on the 17th May, 1957. The respondent then appealed against the decision of the Board to the High Court, which allowed the appeal with costs on the 5th September, 1959. The Comptroller subsequently appealed against the decision of the High Court to this Court.

It is submitted by counsel for the appellant that the dividend of $20,000 was not the respondent's income within the meaning of section 10 of the Income Tax Ordinance. This section provides, *inter alia*, that income tax shall be payable for each year of assessment upon the income of any person accruing in or derived from the Colony in respect of dividends, interest, or discounts. Here it is to be noted that section 35 of the Ordinance provides that the income of any person for each year of assessment shall be the full amount of his income for the year preceding the year of assessment. It is contended that by the terms of the resolution of the 23rd December, 1954, the dividend was not payable to the respondent but was to be credited to his account and to be applied in paying off any amount owed by him to the company and also in paying for the value of the shares which the directors were contemplating issuing in the near future. It is further contended that the company did not distribute the reserves but capitalised them, and that, as Article 96a authorised the company to convert profits, including accumulated profits, into capital, the company's determination to do so is conclusive against the whole world. The case cited in support of this contention is *Commissioners of Inland Revenue* v. *John Blott.*[1] The facts in that case were these. A limited company, under the authority of its articles of association, declared a bonus out of its undivided profits. In satisfaction of the bonus, it allotted to its shareholders as fully paid up certain ordinary shares forming part of the company's authorised but unissued capital. The shareholders of the company had no option to receive cash in lieu of shares in satisfaction of the bonus. It was held by the House of Lords (Lords Dunedin and Sumner dissenting) that the shares credited to John Blott, a shareholder in the company, in respect of the bonus, were distributed by the company as capital and were not income in his hands, which he was required to include in his return of total income from all sources for the purposes of super-tax assessment. Viscount Haldane in his speech in the House of Lords said (at pages 125 and 126 of the report):

> "But, if acting within its powers, it disposes of these profits by converting them into capital instead of paying them over to the shareholders that, as I conceive it, is conclusive as against all the outside world, including the Crown, and the form of the benefit which the shareholder receives from the money in the hands of the company is one which is for determination by the company alone ..... My Lords, for the reasons I have given I think that it is a matter of principle within the powers of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not to distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done, the money so applied is capital and never becomes profit in the hands of the shareholders at all."

With all due respect to the learned judge in the Court below, I think he erred in taking into consideration only what the company did or failed to do up to the 31st December, 1954. I hold that the whole of the transaction must be looked at, that is, the resolution passed on the 23rd December, 1954, by the company in general meeting, the crediting of the respondent's account with the sum of $14,000 on the 31st December, 1954, the resolution of the directors of the 30th June, 1955, giving effect to the resolution of the company, and the debiting of the respondent's account on the 31st December, 1955, with the sum of $14,000, being the value of 140 shares of $100 each allotted on the 30th June, 1955.

It is submitted by counsel for the respondent that the dividend of $20,000 was the respondent's income within the meaning of section 10 of the Income Tax Ordinance. It is contended that the substance of the transaction was that money went out to the shareholders and was paid back to the company. The same view was expressed by Lord Sumner in his dissenting speech in *Blott's* case where he said (at page 139 of the above-cited report):

"What has to be asked and answered in this case is how could they (i.e. profits) be 'capitalised' in accordance with these Acts (i.e. the Companies Acts), without either leaving the holder of the new shares liable to pay them up with new money or sharing out the profits to the allottees, whether in cash or in account, so that the share-out of the money should be used to pay up the shares. To my mind there was either a payment to the shareholder of the nominal amount of the shares or the company paid up the shares itself and gave them away for nothing."

Suffice it to say that Lord Sumner's view was not accepted by the majority of the Lords of Appeal in the House of Lords. The contention of counsel for the respondent must, therefore, be rejected.

The next contention of the respondent is that there was nothing to bind the shareholders to take the shares which might be allotted to them by the directors. It is said that the resolution of the 23rd December, 1954, declared a dividend for credit to the account of shareholders "to pay off any amount any of them may owe to the Company and also to pay for the value of the shares which the directors are contemplating issuing to them in the near future." It is said that these words imply a pious hope that the shareholders to whom shares might be allotted would take the shares. These words, in my opinion, express the determination of the company that the money was not to be paid to the shareholders nor placed at their disposal but to be applied as stated in the resolution. Under the circumstances, the shareholders had no option to receive cash in lieu of shares.

It is further contended by counsel for the respondent that upon the declaration of the dividend by the resolution of the 23rd December, 1954, the sum due for dividend became a debt due from the company to the respondent and that the respondent could sue the company for the dividend. In my opinion, the resolution did not give to the respondent a right to sue for the dividend in cash, his only right being to have the dividend credited to his account and applied as stated in the resolution.

Lastly it is contended on behalf of the respondent that upon the declaration of the dividend it accrued as income under section 10 of the Income Tax Ordinance. Here it is necessary to refer to a case which was not cited by either counsel and in which the meaning of the words "income arising or accruing" was considered by the Judicial Committee of the Privy Council. The case is *St. Lucia Usines and Estates Company Ltd.* v. *Colonial Treasurer of St. Lucia.*[2] The facts in that case were these. In 1920 the appellants sold all their property in St. Lucia and ceased to reside or carry on business there. In 1921 interest upon the unpaid part of the purchase price was payable to them but it was not paid. The appellants were liable to pay income tax for the year 1921 under the Income Tax Ordinance, 1910, of St. Lucia, only if the interest above mentioned was income arising or accruing to them in 1921. It was held by the Judicial Committee that though the interest was a debt accruing in 1921 it was not income arising or accruing in 1921, and that the appellants were not liable under the Ordinance to pay tax for that year. In the judgment of their Lordships which was delivered by Lord Wrenbury it was said:

"The respondent contends that the above interest 'accrued' to the company in the year 1921, because it was payable in that year and none the less because it was not paid in that year. Their Lordships do not agree. The words 'income arising or accruing' are not equivalent to the words 'Debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word 'income'."

It follows from the above case that a dividend is not to be treated as income accruing in the Colony merely because it has accrued as a dividend. The money must accrue as income. In my opinion the dividend in question did not accrue by way of income in view of the terms under which it was credited to the respondent's account.

In the result, I accept the contentions of counsel for the appellant and hold that the dividend of $20,000 was not the respondent's income within the meaning of section 10 of the Income Tax Ordinance. I would therefore allow the appeal with costs here and in the Court below.

Appeal allowed.

Solicitors: *Drew & Napier.*

KATHI-RASEN v. KATHI-RASEN

[O. C. J. (Rigby J.) January 25, 1960]

[Penang — Divorce Petition No. 6 of 1958]

Divorce — Proceedings — Delay not necessarily fatal — Adultery — Public policy — Discretion of Court.

This was a husband's undefended petition for divorce on the ground of his wife's desertion. The respondent left her husband exactly one month after their marriage on March 22, 1941. She was never heard of until the petitioner saw her by chance with another man and 2 children in Butterworth in 1948, on which evidence he asked for a decree nisi.

The petitioner also filed a discretion statement which revealed that from 1944 to 1948 he had lived with another woman, and after which period another one, by whom he had a son and whom he was anxious to marry.

Held: despite the delay in presenting the petition, and the petitioner's adultery, the Court is entitled to exercise its discretion in favour of the petitioner by the grant of a decree nisi:

The duty of the Court is to maintain a delicate balance between the need for the sanctity of marriage and those considerations which make it contrary to public policy to insist on the maintenance of marriage which has in fact ceased to exist. Although a child born in adultery cannot be legitimated by the subsequent marriage of his parents, some advantage does accrue to him from the fact that his parents are married. As the petitioner's marriage in this case is irretrievably broken, in all the circumstances, it is in the interests of all parties concerned — and not against public policy — to enable the regularization by marriage these irregular relationships.

DIVORCE PETITION.

Lim Kean Siew for the petitioner.

Respondent absent.

L. A. Massie (Sr. Federal Counsel) for the Attorney-General.